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Abstract

F I Ipinyomi*

The tension between universalism and cultural relativism in human rights law is especially tested by Female Genital Mutilation (FGM). Universalism in international human rights law argues for promulgation and enforcement of FGM legislation. However, the debate suffers from stagnant attitudinal paradigms which affect dialectics and perceptions on all sides, ignoring the core values of populations and the aim of human rights, resulting in tortured ineffectual rhetoric and intractable positions. FGM is increasingly globally prominent due to rise in immigration and African economic naissance. This article explores universalist and cultural relativist views including; the seemingly neo-imperialistic rhetoric behind eradication, the effect of the progressively pejorative narrative, superfluous ‘pro-culture’ reasoning behind FGM, the support of FGM by women, and the human rights lacuna these create. The article suggests a behavioural and perception shift in preconceptions of the relationship between culture and human rights. The tension between universalism and cultural relativism suggests that to entrench an effective human rights regime that will resonate with the Nigerian population, equilibrium has to be consciously achieved between the competing forces of individual, local, national and international aspirations and values. This ensures that human dignity is not sacrificed to either cultural intractability or self-serving neo-colonial rhetoric.

INTRODUCTION

There has been a lot written on the different types of Female Genital Mutilation (FGM), particularly clinical descriptions and consequences of the procedure; there is also a lot of academic literature explaining the medico-ethical and legal limitations of FGM.¹ Nigeria holds a unique position in the global FGM debate by having once had the highest absolute number of FGM cases – a quarter of the 115 – 130 million cases worldwide, approximately 30

* Academic Staff, University of Bristol.

¹ Nahid Toubia, ‘Female Genital Mutilation.’ in Julie Peters and Andrea Wolper (eds), *Women’s Rights, Human Rights: International Feminist Perspectives* (Psychology Press 1995) 224-37; Comfort Momoh, (ed.) *Female Genital Mutilation* (Radcliffe publishing 2005); Malika Ladjali, Tracey W Rattray, and RJ Walder, ‘Female Genital Mutilation.’ (1993) 307 *BMJ: British Medical Journal* 460; Teresa Ball, ‘Female Genital Mutilation’ (2008) 23 *Nursing Standard* 43; Berhane Ras-Work, ‘Female Genital Mutilation’ in George C Denniston, and Marilyn Fayre Milos (eds), *Sexual Mutilations: A Human Tragedy*. (Springer, 1997) 137; Erica Weir, ‘Female Genital Mutilation’ (2000) 162 *Canadian Medical Association Journal* 1344; TC Okeke, USB Anyaehie, and CCK. Ezenyeaku, ‘An Overview of Female Genital Mutilation in Nigeria’ (2013) 2 *Annals of Medical and Health Sciences Research* 70.

million women.² This is because of the sheer population size of Nigeria in comparison to other states where FGM is prevalent. The import of this is that any change in FGM policy in Nigeria would sharply affect the global picture. There is no federal law banning FGM, though some states where prevalence is high have legislated against FGM, for instance Edo State, Ogun, Cross River, Rivers, Osun, and Bayelsa states.³ The law against FGM in Edo state provides for a sentence of ₦1000 (US\$10) fine and imprisonment of six months upon conviction.⁴

Interestingly, though international academics generally argue that FGM is linked to Islam,⁵ FGM is most prevalent in the Southern part of Nigeria with approximately 57% of adult women in the Southwest being circumcised, compared with 0.4% of women in the Northwest, with very little connectivity to religious distribution.⁶ FGM in Nigeria is entrenched in primordial culture rather than relatively nascent religion. A report published by UNICEF in 2013 reveals that the reasons for FGM differ depending on the culture of which it is practiced. The report notes that some advocacy groups make the mistake in assuming that the social reasons for FGM are universal, however, the reasons for FGM acutely affect the type of FGM practiced.⁷ In the south of Nigeria, the major reason put forward is marriageability, chastity and social acceptance.⁸ The desire for female chastity is linked to the cachet attached to patriarchal authority and control; chastity, in that sense reduces uncertainty about paternity.⁹ In patrilineal and patri-local societies like those that exist in Nigeria, women's sexuality

² UNICEF, 'Nigeria: Female Genital Mutilation' < http://www.unicef.org/nigeria/FGM_.pdf> accessed 11 August 2014

³ No Peace without Justice 'Status of African Legislations on FGM' <<http://www.npwj.org/FGM/Status-african-legislations-FGM.html#sthash.ZoaH7B13.dpuf>> accessed 11 August 2014

⁴ UNHCR 'Nigeria: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)' <http://www.refworld.org/docid/46d5787bc.html> accessed 11 August 2014

⁵ Sami Aldeeb Abu-Sahlieh, 'To Mutilate in the name of Jehovah or Allah: Legitimization of Male and Female Circumcision' (1993) 13 *Medicine and Law* 575

⁶ UNICEF, 'Nigeria: FGM' (n 2)

⁷ UNICEF (2013) *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change* (UNICEF, New York, 2013) 66

⁸ UNICEF, FGM/C (n 7) 33, 63, 65, 115; Okeke, Anyaehie, and Ezenyeaku (n 1) 71

⁹ Frances A Althaus, 'Female Circumcision: Rite of Passage or Violation of Rights?' (1997) 23 *International Family Planning Perspectives* 130, 131

outside of marriage is tightly controlled, virginity is highly priced and brings reward to the mother of the bride, and illegitimacy is acutely stigmatising to the extent of causing de-personification for the child and mother's family but not the biological father.¹⁰ Historically, control of women's sexuality in the North of Nigeria took the form of physical sanctions rather than societal denouncement as was the case in the South. This may account for the reduced prevalence of FGM as a means of ensuring chastity in the North as the sanctions in place are sufficient to ensure chastity.

One cannot begin a discussion on FGM without discussing the nominal evolution of the procedure. Previously, the term 'female circumcision' was widely used; however, to distance the practice from male circumcision and to lend a subconscious air of condemnation to the debate, the use of the term 'Female Genital Mutilation' became prevalent. The term 'female circumcision' is still used by both sides of the debate, but is used exclusively by supporters of the practice. The term FGM identifies it as a human right violation and an example of violence against women and children.¹¹ A less pejorative description which is used in the alternative is 'Female Genital Cutting' FGC, which is wholly and solely descriptive of the process.¹² The term FGM is used in this article non-pejoratively, but for greater identification. The term is also addressed later on in this article.

There are two distinctly separate positions surrounding the debate – the universal human rights argument backed strongly by universal feminists to eradicate FGM on the one hand, and the cultural relativism narrative which argues that all cultures are valid and thus FGM should be lent cultural validity. Universalism proclaims human dignity as paramount,

¹⁰ John C Caldwell, Pat Caldwell, and Israel O Orubuloye, 'The Family and Sexual Networking in Sub-Saharan Africa: Historical Regional Differences and Present-Day Implications' (1992) 46 *Population Studies* 385, 394,402,403; Ogege Samuel Omadjohwoefe, 'Gender Role Differentiation And Social Mobility Of Women In Nigeria' (2011) 27 *J Soc Sci* 67, 70

¹¹ AE Groeneveld, 'Female Genital Mutilation: Tradition versus Human Rights' (2013) 19 *African Journal of Urology* 134, 134

¹² Human Rights Watch 'Q&A on Female Genital Mutilation', <<http://www.hrw.org/news/2010/06/10/qa-female-genital-mutilation>> accessed 11 August 2014

preserved by certain core value which all cultures adopt irrespective of culture;¹³ relativism asserts the validity of all cultural practices devoid of personal bias.¹⁴ This article illustrates how both sides of the debate have made the bodies of Nigerian women and girls into a battleground on which the battle lines of universalism and cultural relativism are drawn and have failed to engage with the desires and aspirations of the people they claim to speak for and/or protect.

The Anti-FGM Debate

The argument against FGM is unambiguous – FGM is a harmful cultural practice without religious justification, it is imposed on women by a predominantly patriarchal system that is intrinsically denigrating to women.¹⁵ The movement to eradicate FGM is in favour of criminalising the practice as the first step to eradication. The term ‘mutilation’ was adopted to encourage criminalisation, by indicating that harm had been visited on someone, it also signifies the practice is one which humanity should distance itself from. Furthermore, it distances FGM from male circumcision which is seen as non-therapeutic but not harmful in the same way as FGM.¹⁶

One limitation of the anti-patriarchal argument for criminalisation is that it ignores the nature of the society in which FGM is practiced. FGM is perceived to be necessary to preserve morality and therefore ensure marriage, and marriage is seen as necessary for social acceptance and identity; marriage is a sign of community responsibility, as part of the

¹³ Katherine Brennan, ‘The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study’ (1988) 7 *Law & Ineq.* 7 367, 371; Karen Engle, ‘Female Subjects Of Public International Law: Human Rights And The Exotic Other Female’ (1991) 26 *New Eng. L. Rev.* 1509, 1523

¹⁴ Brennan (n 13) 382

¹⁵ Ras-Work (n 1)137

¹⁶ Sirkku K Hellsten, ‘Rationalising Circumcision: From Tradition to Fashion, From Public Health to Individual Freedom—Critical Notes on Cultural Persistence of the Practice of Genital Mutilation’ (2004) 30 *Journal of Medical Ethics* 248, 248; there are increasing academic arguments supporting eradicating all forms of genital modifications in children, See Abu-Sahlieh (n 5); also Hellsten’s article argues for the eradication of all forms of circumcision

attainment of personhood within African philosophy.¹⁷ FGM thus becomes part of the path of the accepted process of becoming – becoming a person, becoming a woman, becoming a significant part of society.¹⁸ Criminalising FGM denies women their social acceptance without seeking or accepting other comparable means for ensuring social acceptance. The society in which people live is a large part of their identity and assuring acceptance through the norms which one is accustomed to, ensures that identity; women and girls are thus more likely to support FGM to ensure social acceptance.¹⁹ By arguing for women's autonomy and agency the more aggressive sections of the anti-FGM ironically use their arguments to deny women their agency. The possibility of choice is ignored;²⁰ Nigerian women are told in essence, 'if we say this is bad for you, it is bad and you cannot choose it for yourself.' Societal situations are disregarded wholesale. Either way, their ability or capacity to choose is curtailed. The debate assumes that the aspirations of all women worldwide are monolithically uniform²¹ and the only reason women in the global South do not articulate the same aspirations as those in the West is because patriarchal societies prevent them, or they are not aware of other freedoms enjoyed by women outside their culture²² – therefore, they are in need of 'educating.' Engendered difference is thus requisitioned to serve the ends of the debate, which is the same thing patriarchy stands accused of;²³ actual ethno-cultural

¹⁷ Omadjohwoefe (n 10) 71; IA Menkiti, 'Person and Community in African Traditional Thought', in RA Wright, (ed.), *African Philosophy: An Introduction*. (Lanham, University Press of America 1984) 171, 173; K Gyekye, 'The Akan Concept Of A Person' (1978) 18 *International Philosophical Quarterly* 277; K Gyekye, 'African Ethics' *Stanford Encyclopedia of Philosophy* (Spring 2011 Edition), EN Zalta (ed.), URL: <http://plato.stanford.edu/archives/spr2011/entries/african-ethics> (last accessed 11 August 2014); JL Comaroff and J Comaroff, 'On Personhood: An Anthropological Perspective from Africa' (2001) 7 *Social Identities* 267, 271; T Metz, 'Toward an African Moral Theory' (2007) 15 *Journal of Political Philosophy* 321, 323

¹⁸ Maria Caterina Barbera, 'Revisiting the Anti-Female Genital Mutilation Discourse' (2009) 9 *Diritto & Questioni Pubbliche* 485, 491

¹⁹ Brittany Kühn, 'Universal Human Rights vs. Traditional Rights' (2009) Topical Review Digest: Human Rights In Sub-Saharan Africa Human Rights & Human Welfare, 59, 60,61

²⁰ Sonya Fernandez, 'The Crusade over the Bodies of Women' (2009) 43 *Patterns of Prejudice* 269, 273 – 274, 275

²¹ L Amede Obiora, 'The Little Foxes That Spoil the Vine: Revisiting the Feminist Critique of Female Circumcision' (1997) 9 *Can. J. Women & L.* 46, 49

²² Engle (n 13) 1514, 1515, 1518

²³ Obiora, (n 21) 49

differences are not engaged with as a vital part of global society.²⁴ Women's voices remain unheard. Thus even though criminalisation urges the banning of a cultural practice, such prohibition becomes redundant if the people do not accept such prohibition. Furthermore, if as is suggested, the culture itself is discriminatory in terms of gender, the culture will find new ways to discriminate. Any triumph over the eradication of FGM will be self-serving and have no long-lasting effects on the female population for whom protection is sought.

Criminalisation of FGM labels the practice 'evil' and undesired by society.²⁵ Criminalising a culture practice in those terms is redundant if the practice still enjoys widespread cultural endorsement. As ironically, some Africans find lack of circumcision in both women and men unattractive and repulsive.²⁶ Criminalisation has resulted in death from self-circumcision in Kenya,²⁷ an increase in FGM in Sudan,²⁸ a general upsurge in secret and unsafe procedures,²⁹ and pervasive non-adherence by state and populace.³⁰ Non-enforcement indicates that the laws are ineffective because they impose an extraneous morality.³¹

The language of the debate does not take into consideration the complexities of the emotions, beliefs, values and relationships involved with the practice of FGM. The language is deliberately intended to invoke revulsion.³² 'Mutilation' 'barbaric' 'savage' has been used to describe what some see as a cultural practice integral to their way of life and integral to achieving personhood.³³ When Jay Kamara Frederick was 14, her mother took her from the UK to Sierra Leone to be circumcised. Even though she does not agree with FGM as a

²⁴ Ibid. 57

²⁵ Barbera (n 18) 500

²⁶ Richard A Shweder, 'What about "Female Genital Mutilation"? And Why Understanding Culture Matters In the First Place' (2000) 129 *Daedalus* 209, 219

²⁷ Kühn (n 19) 61

²⁸ Althaus (n 9) 132

²⁹ Brennan (n 13) 376

³⁰ Ibid.,

³¹ Althaus (n 9)133; Barbera (n 18) 500

³² Shweder (n 26) 220

³³ Barbera (n 18) 488

practice, and it has had a profoundly negative mental and physical effect on her, she believes that the language re-victimises women. She says:

*'I don't think anyone has the right to call anyone else mutilated. It's so derogatory. I've had doctors tell me I've been mutilated and I have walked out of their surgeries. Calling it FGM is a way of keeping strong women down. It keeps people in bondage to their own pain and suffering.'*³⁴

In essence she sees FGM as a misguided act of love. The word 'mutilation' is intended creates an analogy with slavery and cannibalism, using the process of naming to incite disgust and imply the lack of choice and the use of coercion.³⁵ Considering the number of 'circumcised' women in the world – 125 million women³⁶ – calling them mutilated, reduces their humanity in the eyes of the rest of the world. Furthermore, labelling a deeply intrinsic cultural practice 'barbaric' or 'savage' only serves to make the practitioners defensive and more resolved to continue in it.³⁷ It leaves the quest for eradication open to accusations of cultural discrimination. Both Obiora and Mugo realise that the debate itself is objectifying and strips African women of their power;³⁸ it ignores the social aspirations behind FGM and suggests that there is pre-meditated malice involved.³⁹ One could argue that it descends into a form of intra-species anthropocentrism – a situation where other humans come to be viewed as having a moral and ethical status higher or lower than the rest of humanity. It portrays African

³⁴ Geraldine Bedell, 'FGM – "An Act of Love"' (The Huffington Post, 21 July 2014) <http://www.huffingtonpost.co.uk/geraldine-bedell/fgm-an-act-of-love_b_5605863.html?utm_hp_ref=uk> accessed 12 August 2014

³⁵ Engle (n 13) 1519

³⁶ UNICEF, FGM/C (n 7) 125

³⁷ Althaus (n 9) 132; Sylvia Tamale, 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa' (2008) 16 *Feminist Legal Studies* 47, 51

³⁸ Obiora, (n 21) 46; Micere Githae Mugo, 'Elitist Anti-Circumcision Discourse As Mutilating and Anti-Feminist (1996) 47 *Case W. Res. L. Rev.* 461

³⁹ Obiora, (n 21) 59

mothers as bad mothers and First World mothers as having all the good parenting skills.⁴⁰

This image is intensified because it is usually mothers and grandmothers cutting their daughters and granddaughters, perpetuating a timeless well-intentioned cultural practice.⁴¹

Thus the narrative becomes insensitive and counterproductive. It is this type of language which informs the ‘Savage-victim-saviour’ metaphor identified by Mutua.⁴² It is Mutua’s assertion that the perpetrators of human rights violations in the global South are portrayed by the human rights society in the West as uni-dimensionally barbaric and savage; the victims are powerless, helpless innocents, while the saviours, the human rights community are the civilisers who cast out bad cultures and governments.⁴³ Admittedly, Mutua’s assertions are fairly extreme and have been said to be ‘dismissively critical’ of international human rights law,⁴⁴ they nevertheless, indicate a broad picture of how the human rights movement may be perceived by those in the global South. This perception can hardly be divorced from the imperial need during colonisation to ban cultural practices that the colonisers were unfamiliar with.⁴⁵ This has entrenched, in the West particularly, stereotypical ideas of African as primitive, savage and barbaric; while the intensity of this cliché is much lightened, there is still a tendency to broadly categorise typologies and causes.⁴⁶ In the case of FGM the ‘savage’ image and ‘victim’ persona become incorporated into one single entity as the drivers of the practice on the physical level are the women in society.⁴⁷ Thus the language polarises, ensuring that anti-FGM laws are governmentally symbolic in the government’s relation with

⁴⁰ Shweder (n 26) 225

⁴¹ Obiora, (n 21) 59 – 60; Shweder (n 26) 222

⁴² Makau W Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42 *Harvard International Law Journal* 201

⁴³ *Ibid.*, 202 – 204; Obiora, (n 21) 51

⁴⁴ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, 298; Israel de Jesús Butler ‘BOOK REVIEWS [Review of Makau Mutua, *Human Rights, A Political and Cultural Critique* (University of Pennsylvania Press, Philadelphia, 2002)]’ (2004) 4 *Human Rights Law Review* 186, 189

⁴⁵ Fernandez (n 20) 272

⁴⁶ Obiora, (n 21) 49 – 50, 57

⁴⁷ UNICEF, FGM/C (n 7) 44

the international community but personally redundant.⁴⁸ The FGM laws become ‘their’ laws and FGM becomes ‘our’ thing.

One of the core impetuses of human rights is the preservation of human dignity. Conversely, the practice of FGM is a way in which dignity and thus human rights are violated. However, by using the language to create victims, this further removes the dignity of women who have been cut and previously oblivious to their own ‘mutilated’ state. How can human dignity be preserved by human rights, by implying a lack of dignity, thus removing dignity in a bid to ensure it? Furthermore, the narrative erroneously suggests that the people within the culture, due to their powerlessness are doing to preserve human dignity.⁴⁹ Realistically, human rights norms are defined by amalgamating and combining several cultural and ideological perspectives, it has been suggested that human rights bodies take this into account and raise awareness rather than demonise cultures.⁵⁰ The picture of humanity is incomplete if cultures are obliterated. Culture is important, though some practices may have to be stopped.

Leading on from this point is the amalgamation of the anti-FGM narrative into one pot-luck discourse that is not unrecognisable in situ; this narrative erroneously implies that there is only one type of ‘African FGM.’⁵¹ The report by UNICEF is very instructive in illustrating the wide variances in practice, ages and purposes of FGM – clitoridectomies are mostly performed in the Nigeria, while infibulation is practiced in places like Somalia and Eritrea with several variations.⁵² The purposes, results, dangers and effects differ widely. Yet the academic narrative does not seem to address these disparities. The result is that mothers are less likely to believe the truth of the debate, where for example a mother is told of the

⁴⁸ Barbera (n 18) 486

⁴⁹ Tamale (n 37) 51

⁵⁰ Brennan (n 13) 395

⁵¹ Obiora, (n 21) 53, 57; Shweder (n 26) 218; Barbera (n 18) 490

⁵² UNICEF, FGM/C (n 7) 7, 45, 47; John C Caldwell, Pat Caldwell, and Israel O Orubuloye, ‘Female Genital Mutilation: Conditions of Decline’ (2000) 19 *Population Research and Policy Review* 233, 244, 247; Okeke, Anyaehie, and Ezenyeaku (n 1) 71

negative effects of infibulation, she is unable to identify with the experience because she has undergone a clitorodectomy and thus more likely to have her daughter undergo the procedure. Not taking these differences into account suggests that the welfare and ultimately the dignity of the girls/women to be protected are of secondary importance to the prominence of the narrative and its peripheral achievements.⁵³ An all-inclusive African FGM ensures that the more horrors included in the narrative highlight the movement, it does not engage effectively with cultures that practice FGM.

This is linked to the fact that the data on FGM in Africa has not always reflected standards of good research practice; prior to the UNICEF report the data has limited validity and was not always verifiable.⁵⁴ The UNICEF report recognises that in-depth research and authenticated data collection on FGM is fairly recent,⁵⁵ it also recognises the limitation of self-reporting, which FGM research has to rely out of necessity.⁵⁶ This implies that a large part of the theoretical academic output prior to the UNICEF report may be based on uncorroborated evidence. Therefore assertions made in the 1970s concerning FGM have had tremendous significance attached to them because they have achieved reliability through reiteration.⁵⁷ Even the UNICEF report as a whole imparts a misleading overview; FGM is largely a cultural practice and not a state practice. Thus the statistics generally do not take into account the religious and ethnic plurality of states, the variation between ethno-linguistic groups changes the import of the data. While the distribution of FGM in Nigeria is not as high as Somalia, this does not take into account the fact that the distribution is much higher in the South of Nigeria than the North. The distribution of women circumcised according to geopolitical zones is approximately as follows: North-West 0.4%, North-East 1.3%, North-Central 9.6%, South-

⁵³ Obiora, (n 21) 59

⁵⁴ Shweder (n 26) 213

⁵⁵ UNICEF, FGM/C (n 7) 3

⁵⁶ UNICEF, FGM/C (n 7) 24

⁵⁷ Shweder (n 26) 213

South 34.7%, South-East 40.8 and South-West 56.9%.⁵⁸ Imprecise research data is reducing the efficacy of the debate as the actual import, distribution and overall practice of FGM is not known.

The anti-African patriarchy tone of the narrative is also slightly hypocritical. Female body modifications around the world are driven by ‘male dominance.’⁵⁹ Sexual reasons for banning FGM are paramount to the debate, seemingly oblivious to the fact that loss of sensation is one of the effects of silicone breast implants.⁶⁰ Nevertheless the major difference between these instances is age and thus the (in)ability to consent. This is not an insignificant difference which will be addressed later in this article.

The Western ideal as regards FGM is driven by a continued response to Western experiences. To ‘cure’ women of various perceived ailments in the 19th century clitoridectomies and hysterectomies were performed in England, and in the USA until 1935 infibulations and clitoridectomies served the same purpose.⁶¹ Also Sigmund Freud asserted that the elimination of clitoral sexuality and thus clitoridectomies were a prerequisite for femininity.⁶² These practices form the backdrop of Western understanding of FGM. The western history of FGM was mainly to control; the anti-FGM debate assumes that cultures that currently practice FGM have the same cultural history of male dominance and seeks to transplant the successful responses to Western FGM to a varied African FGM that has not been diligently researched.⁶³ The result is that anti-FGM activists ignore the possibility of any other narrative surrounding FGM, by seeing the practice through their own eyes and not the eyes of African women.⁶⁴

⁵⁸ UNICEF, ‘Nigeria: FGM’ (n 2)

⁵⁹ Barbera (n 18) 494 – 5

⁶⁰ *Ibid.*, 497

⁶¹ *Ibid.*, 494

⁶² *Ibid.*,

⁶³ *Ibid.*,

⁶⁴ *Ibid.*,

Ultimately, the universalism narrative usually ignores the difference in communal core values between regions and cultures of the world. The West, which is the key player in the human rights movement, sees its core values as human dignity and freedom,⁶⁵ which could result in aggressive individualism and isolation of individuals within their communities. On the other hand Africa's core values are community-constructed personhood, extended patriarchal and mostly patrilineal families as the key building blocks of society, and organic communities,⁶⁶ some of the negative effects of these are intransigent patriarchy, female subordination and female objectification. It has been asserted that African legal philosophy does not recognise individual rights as a source of protection of dignity.⁶⁷ Thus it is very difficult for African cultures and governments to adopt the aims of international human rights law. It is for the society to protect human dignity and social relevance through socio-cultural institutions. The government is left with task of protecting democratic rights (for example civil and political rights such as the right to fair trial and political participation) and human welfare rights (ESC [economic, social and cultural] rights such as the right to education and housing). To achieve its core values Africa recognises identity within a family and society, solidarity and fecundity; it thus views Western values as condescendingly individualistic and disrespectful. Each side thinks it cannot live as the other does, FGM is an extreme example of what Richard Shweder calls the 'mutual yuck' response.⁶⁸ Currently, the anti-FGM narrative argues for the removal of one key aspect of communal relationship without addressing in any way the communal relationship that surrounds this practice. This misconstrues and ignores the way in which culture and practices interact with each other. Practices in themselves do not objectify, but cultures do. If the culture objectifies, banning one practice does not negate the nature of the culture, nor does it address the life situations of the people living in that culture. The

⁶⁵ Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 400, 415

⁶⁶ Menkiti (n 17) 173; Gyekye (n 17) 277-287

⁶⁷ Brennan (n 13) 371

⁶⁸ Shweder (n 26) 216

implication is that the narrative silences the voices of those who matter – Nigerian women. Thus criminalisation inadvertently ends up denying Nigerian women their voice, causing defensive cultural adherence and not protecting to the greatest extent possible the girls who may be subject to FGM.

The human rights debate also self-contradicts; while pushing to eradicate FGM, the collection of data, and the ‘education’ of African women form a central part of the *modus operandi*. This agenda unintentionally denies African women their rights to personal and family privacy; removes from them their right to make what they think are the best choices for their children, allowing government to become excessively involved in family life.⁶⁹ This is ironic because human rights law is a check on government intrusion in the life of citizens; the anti-FGM debate uses human rights to increase government intrusion.

A quote cited by Obiora illustrates how the FGM debate sometimes ignores the bigger picture:

*‘I have visited villages where, at a time when the village women are asking for better health facilities and lower infant-mortality rates, [pipeborne water and access to agricultural credit], they are presented with questionnaires ... on female circumcision.’*⁷⁰

LIMITATIONS OF THE CULTURAL RELATIVISM PRO-FGM DEBATE

Increasingly, there are fewer academic articles and academic cultural relativists who actually argue in favour of FGM. One Nigerian Nowa Omogui, a doctor working in South Carolina in the US, stands out; his article in the Vanguard supporting FGM has been reproduced by

⁶⁹ Ibid., 226

⁷⁰ Obiora, (n 21) 70

Intactivism on its website.⁷¹ His arguments can be summarised as follows: FGM should continue as; male circumcision has not been banned, cultural secularity must be protected in a multicultural nation; other forms of body modifications are acceptable – Shari’a allows the cutting of limbs as punishment, body piercings and tattoos are acceptable; medicalization will solve the health risks; and customs and cultures are dying.

These arguments are an extreme application of cultural relativism which emphasises the primacy of culture to the detriment of human rights or physical well-being. Cultural relativism theoretically pursues ‘*the theory that there is infinite cultural diversity and that all cultural practices are equally valid*’;⁷² ideally recourse to relativism ensures that cultural practices should be assessed devoid of personal bias.⁷³ The culture relativism narrative contradictorily encourages intransigence of culture; yet culture is fluid. Changes in culture occur when society either distances itself from a particular ideology, or the ideology is no longer relevant to communal life.⁷⁴ The role of societal components changes as society evolves. In pre-colonial Africa, high mortality rates made it imperative for women to constantly reproduce; 50% of all children were dead by the age of five, and human beings were the major economic resource due to the prevalence of farming, therefore a constant source of reproduction was necessary.⁷⁵ This was also allied to the secondary need to preserve the genetic purity and continuance of clans and community as claims to power and identity.⁷⁶ It could be argued that the secondary intangible need arose from the primary necessity for economic security and survival. These particular purposes and functions of society have since become obsolete, yet

⁷¹ ‘FGM defended on the same grounds as MGM’ reproducing Nowa Omogui, ‘Opinion: HB 22 Bill And Genital Mutilation’ *Vanguard Daily* (Lagos, February 20, 2001) <<http://www.circumstitions.com/FGM-defended.htm>> accessed 11 August 2014

⁷² Brennan (n 13) 370

⁷³ Ibid.; 382

⁷⁴ Donnelly (n 65) ‘Cultural Relativism and Universal Human Rights’ 411

⁷⁵ Omadjohwoefe (n 10) 68

⁷⁶ Cheikh Anta Diop, *Precolonial Black Africa: A Comparative Study of the Political and Social Systems of Europe and Black Africa, From Antiquity to the Formation of Modern States*. (Chicago Review Press, 1988) 48; Daniel Jordan Smith, “‘These Girls Today Na War-O’: Premarital Sexuality and Modern Identity in Southeastern Nigeria’ (2000) 47 *Africa Today* 99, 110

gender roles have remained static; in some cases the role of women has become unnecessarily and incongruously adulterated by Victorian values due to colonial influences.⁷⁷ Sexual behaviour has changed irrevocably as urbanisation and more complex economic structures continuously transform attitudes towards sexual behaviour; adapting to the new realities while still being rooted in traditional Nigerian cultural values.⁷⁸ For example, the desire to ensure purity and continuance of bloodlines is now evidenced by a requirement of pregnancy before marriage to guarantee fecundity.⁷⁹ There is however no conscious move to adapt culture to the changes in society, so traditional voids appear and some cultural artefacts remain, while other traditional practices die off.⁸⁰

It is cultural extinction and the relentless erosion of traditional practices that spurs cultural relativists to intransigently resist any legislative attrition of culture. Much of this inflexibility is due to the interconnectedness between culture and identity, where the perceived destruction of culture is felt keenly to be the obliteration of society-constructed individualism and communal identity. There is evidence that the experience of being caught between two or more cultures either in the diaspora or *in situ* is profound;⁸¹ this cultural limbo manifests in various ways but majorly serves as a driver against any change in traditional custom practice as a question of cultural identity.⁸² In addition, in colonial Africa FGM came to symbolise successful cultural resistance against the immense might of the colonial forces.⁸³ Thus we can

⁷⁷ Omadjohwoefe (n 10) 69 – 70,72

⁷⁸ Smith (n 76) 109, 110, 116, 117

⁷⁹ Peter Olasupo Ogunjuyigbe and Adunola Adepoju, 'Perspectives on Socio-Cultural Context of Adolescent Reproductive Health Behaviour in Nigeria' (2014) 27 *African Population Studies* 343, 344; Brennan (n 13) 390

⁸⁰ Ogunjuyigbe and Adepoju, (n 79) 343, 344

⁸¹ Jeffery Yen and Lindy Wilbraham, 'Discourses of Culture and Illness in South African Mental Health Care and Indigenous Healing, Part II: African Mentality' (2003) 40 *Transcultural Psychiatry* 562, 571; Suzanne Foley, "'I Am a Lie': Connections between Identity and Narrative in Tracks and Season of Migration to the North' (2014) 31 *Kunapipi* 161.

⁸² Amy Abdelshahid and Catherine Campbell, "'Should I Circumcise My Daughter?'" Exploring Diversity and Ambivalence in Egyptian Parents' Social Representations of Female Circumcision' (2014) *Journal of Community & Applied Social Psychology* <<http://onlinelibrary.wiley.com/doi/10.1002/casp.2195/pdf>> accessed 12 August 2014; Thomas McNamara, 'Not the Malawi of Our Parents: Attitudes toward Homosexuality and Perceived Westernisation in Northern Malawi' (2014) 73 *African Studies* 84

⁸³ Barbera (n 18) 492

see that certain cultural practices, apart from serving an original intrinsic purpose, become a sign of culture individualism and pride. When the original purpose becomes extinct, the relevance of the practice would merely be a source of pride. Pride on its own is an insufficient reason to continue with a harmful practice.

Also, this cultural narrative is conversely, contrary to the nature of African community. Menkiti illustrates how African community differs from Western society, by pointing out that African community is a fused singular entity and society is not constituted by individuals, but society/community constitutes persons.⁸⁴ The purpose of the community is to preserve the well-being of the individual; the individual does not require the state or human rights – her best interests are protected by the community that constitutes her. A cultural practice which is not beneficial to the individual ideally should not be able to survive in Menkiti's idea of African community. The survival of cultural practices result largely from the vague role of culture in post-colonial Nigeria, and the incoherence of customary institutions within the apparatus of state. It may be instructive that where FGM has declined, the narrative that encourages this is objective and non-cultural citing among other things; medical reasons such as increased peril in childbirth and the lack of religious foundation.⁸⁵ This is an indication that community-oriented culture should be focused on protecting the individual and not culture itself. Currently, the 'pro-FGM' narrative is cyclically self-serving, furthermore, due to the organic nature of African society, the narrative by not protecting human dignity, may end up destroying the culture it aims to protect.

⁸⁴ Menkiti (n 17) 179, 180.

⁸⁵ Caldwell, Orubuloye and Caldwell, *Female Genital Mutilation: Conditions of Decline*, (n 52) 247, 248, 249

UNIVERSALISM VS CULTURAL RELATIVISM

Therefore, cultural relativists ignore the possibility of human rights having any impact on culture.⁸⁶ Culture in this sense is paramount and innate and human rights law is extraneous. On the other hand universalism as a theory views rights as superordinate to culture. In practice it is very similar to the repugnancy doctrine which will be discussed later. To some extent universalism and cultural relativism are mutually exclusive opposing ideas – universalism asserts that human dignity is preserved by certain set standards which all cultures adopt irrespective of culture.⁸⁷ Universalism pursues the enforcement of moral rights and rules, consigning culture to an irrelevance, while relativism only recognises rules that do not conflict with cultural practices as it believes that rules arise from cultural moralities.⁸⁸ Neither universalism nor relativism appreciates the fact that international jurisprudence is exceptionally pluralistic yet needs agreed principles for the preservation of international peace and security. Globalisation will increasingly force us to be aware of cultural practices remarkably different from ours and to be constrained by rules not emanating from within our own socio-cultural moral framework. Cultural relativism ignores the evolutionary nature of culture and the human security advantages of set standards; universalism ignores the relationship between culture, identity and human welfare, especially in cultures with overt customary practices. Neither side is served by condescendingly regarding the opposite argument as inherently and completely wrong. Realism and pragmatism should inform the relationship between the two sides of the debate.

The UN walks a fine line between balancing culture and human rights. In December of 2012, the General Assembly adopted a resolution Article 4 of which calls for the criminalisation of FGM. Article 10 *'urges States to pursue a comprehensive, culturally sensitive, systematic approach that incorporates a social perspective and is based on human rights and gender-*

⁸⁶ Shweder (n 26) 217

⁸⁷ Brennan (n 13) 371; Engle (n 13) 1523

⁸⁸ Donnelly (n 65) 'Cultural Relativism and Universal Human Rights' 400, 401

*equality principles.*⁸⁹ The plurality of states at the UN ensures that its resolutions are duly sensitive to all conflicting theories. This sensitivity was exhibited in relation to FGM during sessions of the Working Group on Traditional Practices Affecting the Health of Women and Children established by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1985; the working group submitted its report in 1986.⁹⁰ In addition to this the Report of the Commission on the Status of Women refrained from pejorative language in description of FGM, while it simultaneously called for the eradication and criminalisation of FGM.⁹¹ This understanding is not reflected in academic research, nor NGO material. Nevertheless, the adoption of a resolution or even the ratification of a treaty at the UN is no guarantee of practical enforcement of its contents.⁹² It could be said that the oversensitivity of the UN has led to a reduction in effectiveness.

FGM serves as evidence that the tension between universalism and cultural relativism is ongoing and may always be a constant. The fact that most states where FGM is practiced are members of the UN and have ratified the human rights covenants suggests that each must imperatively criminalise FGM as a violation of human rights.⁹³ However, cultural practices such as FGM are the exception to the work of the UN which is usually to castigate governmental abuses and violations of human rights.⁹⁴

Post-independent Nigeria, recognising the inflammatory possibilities associated with legislatively controlling cultural practices in a pluralistic society, constitutionally and legislatively ignored gender-based cultural norms e.g. inheritance, adoption, burial and

⁸⁹ General Assembly Resolution A/RES/67/146, 'Intensifying global efforts for the elimination of female genital mutilations' 20 December 2012

⁹⁰ Brennan (n 13) @ 382 – 385, 387

⁹¹ Articles 70 – 74, Commission on the Status of Women, E/CN.6/1995/3/Add.4, 'Monitoring The Implementation Of The Nairobi Forward-Looking Strategies For The Advancement Of Women' 18 January 1995

⁹² Eric Neumayer, 'Do International Human Rights Treaties Improve Respect For Human Rights?' (2005) 49 *Journal of Conflict Resolution* 925, 946, 950

⁹³ Brennan (n 13) 372

⁹⁴ Brennan (n 13) 372

succession.⁹⁵ Nigeria relied on a less definite means by which to exclude undesired cultural norms from her jurisprudence – the ‘repugnancy doctrine.’ It is encapsulated in many national instruments as allowing courts to recourse to:

‘the native Law and custom prevailing in the area of the jurisdiction of the court or binding between the parties, so far as it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any written law for the time being in force’⁹⁶

The existence of a repugnancy doctrine in post-colonial states exists as a form of legal dependence as the laws and principles were the standard are colonial.⁹⁷ It also causes the cessation of cultural development where previously culture was evolutionary.⁹⁸ It does not signify a real engagement with the core values of the people.

For change in culture and promulgation of legislation to be effective, especially in relation to FGM, policy-makers have to be willing to take the debate outside ‘formal legal structures’, lending it objectivity, vitality and validity.⁹⁹ This is because the tension between cultural relativism and universalism has become politicised; the debate has allowed states to utilise these conflicting stand-points as an attack or defence based on largely state-centred egocentric governmental ends.¹⁰⁰ This was evidenced by the Cold War era vilification of communism and capitalism as well as the recognition of Asian values in human rights.¹⁰¹ Furthermore, the institutionalisation of these theories has caused the debate to become inflexible,¹⁰² thus policies that arise from either will always attract polarised support. Universalists see cultural

⁹⁵ Tamale (n 37) 54

⁹⁶ Cited by Derek Asiedu-Akrofi, in ‘Judicial Recognition and Adoption of Customary Law in Nigeria’ (1989) 37 *The American Journal of Comparative Law* 571, 572. The repugnancy clause is contained in several existing in several legal instruments. See Supreme Court Ordinance, Section 19(1), No. 4 of 1876; Supreme Court Ordinance, Section 19(1) 1914

⁹⁷ Claire Natoli, ‘Legal Independence in Australia’ (2011) 7 *Cross-sections* 65, 66

⁹⁸ Uchechukwu Ewelukwa, ‘Post-Colonialism, Gender, Customary Injustice: Widows in African Societies’ (2002) 24 *Human Rights Quarterly* 424, 451

⁹⁹ Engle (n 13) 1524

¹⁰⁰ Claire Charters, ‘Universalism and Cultural Relativism in the Context of Indigenous Women’s Rights’ (2003) *Human Rights Research* 1, 14 – 16

¹⁰¹ Xiaorong Li, ‘“Asian Values” and the Universality of Human Rights’ in Verna V Gehring and William Arthur Galston (eds), 13 *Philosophical Dimensions Of Public Policy* (Transaction Publishers 2003) 171, 174

¹⁰² Charters (n 100) 18

relativism as an excuse for human rights abuse, while cultural relativists see universalism as a form of neo-colonial/imperial oppression.¹⁰³ The choice left to traditional cultures and their practitioners is to either remain absolutely within their culture and attract derogatory labels or adopt the universalist ideal and turn their back on their culture and identity. Therefore both sides of the debate ignore the welfare and needs of the people, because both theories do not emanate from the people, but progress from the 'top-down'.¹⁰⁴ Universalism by nature is imposed, it aims to entrench uniformity of standards; these standards have external origins. For all its supposed altruism, cultural relativism is a state-centric means by which governments in the global South assert the exceptional status of their cultures and their self-recognition of the inferior status of their states in the content of international legislation.¹⁰⁵ It is self-centred resistance in a quest for governmental state and neither societal nor communal relevance in the international community. The problem with this political rebellion is that the culture upon which resistance is founded becomes inflexible, contrary to the intrinsic nature of culture. Both universalism and cultural relativism ignore the fact that for most states in the global South, the nature of culture is not driven state structures due to the ethno-linguistic plurality which translates to multiplicity of cultures and thus multiplicity of ideas that will necessarily conflict. The result of this for FGM is that the debate ignores reality and becomes full of rhetoric and ineffectual.

RECOMMENDATIONS

To bridge the gap between cultural relativism and human rights, a purely legal solution may not be effective in states like Nigeria with a strong cultural history of FGM.¹⁰⁶ For example,

¹⁰³ Ibid., 18 – 19

¹⁰⁴ Ibid., 24

¹⁰⁵ Ibid., 16

¹⁰⁶ Althaus (n 9) 133

La Barbera suggests that a symbolic cut may be acceptable to all sides of the debate.¹⁰⁷ This may satisfy the health argument, but may not appease the notion rejecting FGM as objectifying women. Furthermore, depending on the reason for supporting FGM, cultural relativists may not be appeased; this despite scientific evidence suggesting that FGM may not guarantee fidelity/chastity.¹⁰⁸

Additionally, the regulation of FGM, like many cultural practices, is subject to the incongruence of African states and institutional lethargy.¹⁰⁹ Therefore, any legislation on FGM which does not address the overall cultural integration of Nigeria and institutional failure would be destined to merely occupy space in the statute books.

Objective dialogue is required nationally to ascertain what role culture plays in determining the practice of FGM specifically and the role of women generally. The polarisation of the debate stifles genuine dialogue that could lead to better protection of girls and women in society. The UNICEF report found that in Nigeria 35% of boys and men and 31% of girls and women do not know what the opposite sex thinks about FGM.¹¹⁰ This indicates that for all the academic debate and measures taken by global civil society, the actual players are not speaking to each other or to anyone about the issues directly affecting them.

The academic/NGO debate needs to see the bigger picture and address unanswered questions. If any excision amounts to torture thus attracts criminalisation what is the status of male circumcision in international law? This question becomes more pertinent as the debate emphasizes the lack of capacity to consent at the time of circumcision. Furthermore, if FGM

¹⁰⁷ Barbera (n 18) 501

¹⁰⁸ Mohammed H El-Defrawi, Galal Lotfy, Khadiga F Dandash, Amany H Refaat and Moustafa Eyada, 'Female Genital Mutilation and Its Psychosexual Impact' (2001) 27 *Journal of Sex & Marital Therapy* 465; Lucrezia Catania, Omar Abdulcadir, Vincenzo Puppo, Jole Baldaro Verde, Jasmine Abdulcadir and Dalmar Abdulcadir. 'Pleasure and Orgasm in Women with Female Genital Mutilation/Cutting (FGM/C)' (2007) 4 *The Journal of Sexual Medicine* 1666

¹⁰⁹ Tamale (n 37) 54

¹¹⁰ UNICEF, FGM/C (n 7) 63, 58

is considered a human rights issue rather than a matter for domestic criminal/private law, in a state where approximately 30 million women and girls have been circumcised rationally, this would be a situation of massive violations of human rights in which the government is complicit by not legislating against FGM or enforcing existing laws. What then is the role of the international community? The FGM debate also highlights the cracks within the unnecessary dichotomy between civil political rights and ESC rights. Criminalisation of FGM is argued by citing civil and political rights violations, while cultural relativists cite ESC rights and a right to family life and culture. Thus violations in terms of civil political rights attract greater obligations and justiciability, while freedom to practice culture becomes a secondary consideration, except for the fact that states which have a cultural relativist agenda are thereby able to hold civil and political rights hostage. This obscures the aim of human rights which should be human security and welfare; the main end of any debate should not be ideology.

CONCLUSION

The tension between cultural relativism and universalism of human rights in relation to FGM, threatens to ignore the welfare, voices, dreams and aspirations of Nigeria's women and girls. The bodies of Nigerian women should not be sacrificed on the altar of academic debate. There is an African proverb that says *'When two elephants fight, it is grass that suffers.'* When two strong and dominant theories are in conflict, it is the weak and least powerful, women, who are meant to be protected, that get trampled upon... or ignored.